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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY STEVEN BOMAN,

Defendant and Appellant.

C073674

(Super. Ct. No. CM036678)

On or about June 9, 2012, defendant Gary Steven Boman possessed 0.14 gram of methamphetamine, a useable amount.¹ In October 2012 he pleaded no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admitted having served three prior prison terms (Pen. Code, § 667.5, subd. (b)). In exchange, one count of possession of a smoking device (Health & Saf. Code, § 11364.1)

¹ Because the matter was resolved by plea and defendant waived preparation of a probation report, our statement of facts is taken from the parties' stipulation of factual basis for the plea.

and four unrelated cases were dismissed with a *Harvey* waiver.² Defendant also pleaded no contest to an unrelated misdemeanor.

In October 2012 imposition of sentence was suspended and defendant was placed on intensive Proposition 36 probation for three years. He was ordered to pay a \$240 restitution fine (Pen. Code, § 1202.4); a \$240 restitution fine, suspended unless probation is revoked (Pen. Code, § 1202.44); a \$190 laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)), including penalty assessments; a \$250 Proposition 36 drug program fee (Pen. Code, § 1210.1); a \$380 Proposition 36 drug testing fee (Pen. Code, § 1203.1ab); a \$40 court operations fee (Pen. Code, § 1465.8, subd. (a)(1)); and a \$30 court facilities assessment (Gov. Code, § 70373). The court reserved imposition of a \$540 drug program fee (Health & Saf. Code, § 11372.7), probation supervision fees (Pen. Code, § 1203.1, subd. (b)), and public defender fees (Pen. Code, § 987.8).

On December 13, 2012, a petition was filed alleging that defendant had violated his probation by testing positive for marijuana and alcohol on December 5, 2012, and by testing positive for marijuana and methamphetamine on December 10, 2012.

In April 2013 defendant admitted the December 5, 2012, allegation and waived all of his presentence credits. He stipulated to a five-year term in state prison and expressly waived any claim that Penal Code section 1170, subdivision (h)(3) is invalid insofar as it prohibits him, as a Penal Code section 290 registrant, from serving his term in county prison. In exchange, the December 10, 2012, allegation, an allegation of failure to appear in court, and an unrelated case were dismissed with a *Harvey* waiver. Defendant's prison exposure in the unrelated case was nine years.

Defendant was sentenced to prison for the middle term of two years, plus three years for the prior prison terms. The court expressly found that, based on defendant's

² *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

status as a Penal Code section 290 registrant, the appropriate placement was state prison rather than county prison. The court acknowledged the previously imposed restitution fine and ordered imposition of the probation revocation fine. The court also acknowledged the previously imposed laboratory analysis fine and penalty assessments, as well as the court operations fee and the court facilities assessment. The court did not impose the items it previously had reserved. Defendant obtained a certificate of probable cause.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief reasserting his previously waived claim that Penal Code section 1170, subdivision (h)(3) is invalid insofar as it prohibits him, as a Penal Code section 290 registrant, from serving his term in county prison. The claim is not properly before us.

“Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*).)

In this case, defendant received the benefit of his bargain, including dismissal of an unrelated case with a prison exposure of nine years. Defendant was expressly advised that the bargain included a stipulated state prison sentence and that the stipulation would preclude him from challenging Penal Code section 1170, subdivision (h)(3), as follows:

“The Court: And do you understand that by stipulating to the sentence, that you may very well be giving up your appellate rights in contesting the issue of whether it should be a state prison commitment because you’re agreeing that this is a state prison commitment?

“The Defendant: Okay.

“The Court: All right.”

In his supplemental brief, defendant tries to do what the trial court warned him he could not do: “better the bargain through the appellate process.” (*Hester, supra*, 22 Cal.4th at p. 295.) Defendant is not allowed to trifle with the courts in this manner.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

ROBIE, J.